

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AACRES/ALLVEST, L.L.C.¹

Employer

and

Case 36-RC-6152

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 38

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization⁴ involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

¹ The name of the Employer appears as amended at the hearing

² The Petitioner filed a timely brief, which was considered.

³ The record shows the Employer is a Washington State limited liability company engaged in providing resident social support services in Clark County, Washington. The record also shows that during the past calendar year the Employer received in excess of \$250,000 of revenues from a contract with the State of Washington. I take administrative notice that the State of Washington is an entity directly engaged in interstate commerce. The Employer meets the non-retail social services standard and has sufficient interstate impact to meet the statutory jurisdiction requirements.

⁴ The parties stipulated that the Petitioner is a "guard" labor organization with the meaning of Section 9(b)(3) of the Act.

All live-in counselors, support counselors, on-call counselors⁵, and lead counselors employed by the Employer in Clark County, Washington, excluding all other employees and supervisors as defined in the Act.

The sole issue in the proceeding concerns whether the Unit employees are “guards” within the meaning of the Act.⁶ The Petitioner claims the unit employees are guards within the meaning of the Act and since Petitioner is a “pure” guard union, Petitioner is qualified for certification for this unit. The Employer appears to take a neutral position as to the guard status of the employees in question. I find that the counselors in question are guards within the meaning of the Act for the following reasons.

Facts

The Employer operates a series of community protection, supported living programs in the Vancouver, Washington area (Clark County). The programs are based in numerous individual residences scattered throughout the community. The residents/clients are individuals who meet certain Washington State criteria for placement in this program. These residents are individuals who have been classified as presenting a danger to the community, primarily through serious sexual offenses. All of the residents must have some developmental disability in order to qualify for this program. There are other categories qualifying for the program (all of which appear to describe individuals who would be a danger to the community), which is administered by the Washington State Division of Developmental Disabilities. These clients also receive mental health counseling, performed by an unrelated organization and not at issue in this matter. Some residents may have a criminal history and those individuals are also overseen, in part, by the criminal justice system.

The clients are placed in the Employer-operated residences, where they are supervised by the counselor staff. The residents have very individual needs and treatment programs. The degree of supervision can vary from resident to resident, depending on their circumstances and history. In general, the residents live in the homes either alone or with one or two housemates (if deemed advisable by the treatment program). The live-in counselors share the individual residence with the client(s) 24 hours a day, working 7 days on, 7 days off. The counselors are charged with “line-of-sight”⁷ supervision of the residents until 10:00 p.m., when the residents retire to their own bedrooms. The homes are alarmed, their primary function being to monitor the residents leaving or moving around the residence (as opposed to guarding against intruders). When the counselors do not have line-of-sight contact, such as at night, the counselors monitor the alarms from the staff room. The staff room can be a separate office or more likely it is part of the living space for the counselor. The alarm monitors and keypads are located in these staff rooms.

The residents are supervised in the same manner when they leave the home for work or other approved reasons. A counselor must accompany residents to treatment and medical appointments, as well as on shopping trips. Some residents are employed; the live-in counselor

⁵ The parties stipulated as to the composition of the Unit, also agreeing that the on-call counselors must have worked an average of four hours or more per week during the last three calendar months in order to be included in the appropriate unit. *I take this stipulation to mean that the period ends within the eligibility date established herein, that one three-month period is used for calculation, and that only actual hours paid for are counted.*

⁶ The undersigned declined to accept a Stipulation for Certification upon Consent Election, and set this matter for hearing, because of his concern about the possible non-guard status of the Unit members. The Statute prohibits Board certification (or even conduct of an election) of a Unit including non-guards by a “guard” union.

⁷ This means the resident must be directly visible to the counselor 100% of the time.

drives them to work. Unless they are supervised at their place of employment through an approved program, the resident must have a counselor present at work at all times, in line of sight. The resident counselor must remain at the residence to monitor the other residents, unless there are none there to monitor, in which case he will accompany the resident to work or elsewhere. Otherwise, the support counselors are available for any of these tasks, as well as to cover additional staffing needs on a regular basis. The leads are stationed at the Employer's offices and perform numerous administrative tasks, but spend a significant amount of their time filling staffing needs as required.

Residents can have visitors if the treatment program approves them; the counselors monitor visitors and turn away those who are unapproved. The counselors do not wear uniforms and are not armed, but they are trained in defensive physical restraint techniques. They receive training in non-violent crisis intervention, which appears to be designed to give the counselors tools to verbally deal with crisis situations; that training includes limited physical restraint training. Counselors search incoming packages and mail to ensure they do not contain contraband or unapproved materials.

Counselors verify the presence of the clients at the home and on outside trips; the alarms are activated 24 hours a day, including some alarms within the residence. If a disturbance occurs, the counselors attempt to de-fuse the situation or notify their supervision. They do not physically intervene except to prevent personal injuries to themselves, the clients or the public. If a client attempts to leave without permission, the counselors attempt to talk them out of that action, or notify their supervision, but do not physically block a violation.

Conclusions

Section 9(b)(3) of the Act defines a "guard" as "any individual employed....to enforce against employees and other persons rules to protect property of the employers or to protect the safety of persons on the employer's premises...." Employees are guards if a significant part of their job function is the performance of guard duties, as opposed to being merely incidental to their primary function. See *Arcus Data Security Systems*, 324 NLRB 496 (1997); *Rhode Island Hospital*, 313 NLRB 343 (1993).

The Board has found employees at a work release center to be guards where they ensured that no unauthorized visitors entered the facility; searched all visitors and inmates entering the facility for contraband; searched packages entering the facility; monitored surveillance cameras; counted inmates, and were instructed to notify their supervisors in the event of a disturbance caused by the inmates. See *Crossroads Community Correction Center*, 308 NLRB 558 (1992). Here the counselors have the same kinds of duties and more.

Where the Board has found employees in similar contexts not to be guards, their guard-like functions were only incidental to their non-guard functions. See e.g., *Ford Motor Co.*, 116 NLRB 1995 (1956) (receptionist not a guard); *55 Liberty Owners Corp.*, 318 NLRB 308 (1995) (doorpersons not guards).

Here the Employer has given guard duties and responsibilities to its counselors and they are specifically charged with enforcing the Employer's rules (including Washington State rules, through the State contract) against residents and non-employees. They are responsible for protecting the Employer's premises and safety of persons on its property, as they regularly monitor the residents, have line-of-sight supervision of the residents, conduct searches of incoming materials for contraband and monitor visitors to the premises. They are trained in

non-violent techniques, but do have some training in physical restraints. These functions are clearly closely related to the functions found to be primary guard duties in *Crossroads*. While the counselors do not carry guns or wear uniforms, their guard responsibilities are not minor or an incidental part of their overall responsibilities. They also closely monitor the residents when they are out in public, for safety of the public.⁸ Moreover, even if not all of their activities were “guard” activities, they do perform indisputable guard activities regularly, a substantial portion of their work time. Accordingly, I find the counselors to be guards as defined by Section 9(b)(3) of the Act. Thus, it is appropriate to conduct an election for these employees involving this labor organization.

There are 17 live-in counselors, 9 support counselors, 5 on-call counselors and 2 leads, for a total of 33 guards in the appropriate Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off *provided that the on-call minimum is met*. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Government Security Officers of America, Local 38.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list

⁸ The predominant activity seems to be to protect the *public* – i.e. these outside the home's boundaries – from the resident. Thus, the resident is confined, and remains under constant surveillance. Arguably, protecting society from a potential conduct of a sexual deviant does not fail whether the literal statutory language of “protecting property of the employers [or the client] or protecting the safety of persons on the employer's [or the client's] premises”. See Section 9(b)(3) of the Act. I conclude that in the circumstances of this case, when the resident leaves the facility for medical or other appointments, shopping or employment, the “premises” of the client (the State) is wherever the client happens to be, consistent with the State's directions – at the moment – at the therapist, at work or in transit. Accordingly, I also conclude that the statutory guard requirements are also met when monitoring the residents off-site, to protect the nearby public.

must be of sufficiently large type to be clearly legible. The Subregion shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Subregional Office, 601 SW Second Ave., Suite 1910, Portland, OR 97204-3170, on or before September 3, 2002. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 10, 2002. [Because of delays of US Mail directed to US government addresses in D.C., use of alternative delivery modes is strongly suggested.]

DATED in Seattle, Washington, this 27th day of August 2002.

Paul Eggert, Regional Director
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